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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 97.

UNION STEAMBOAT COMPANY, Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Libellant.

BRIEF FOR PETITIONER.

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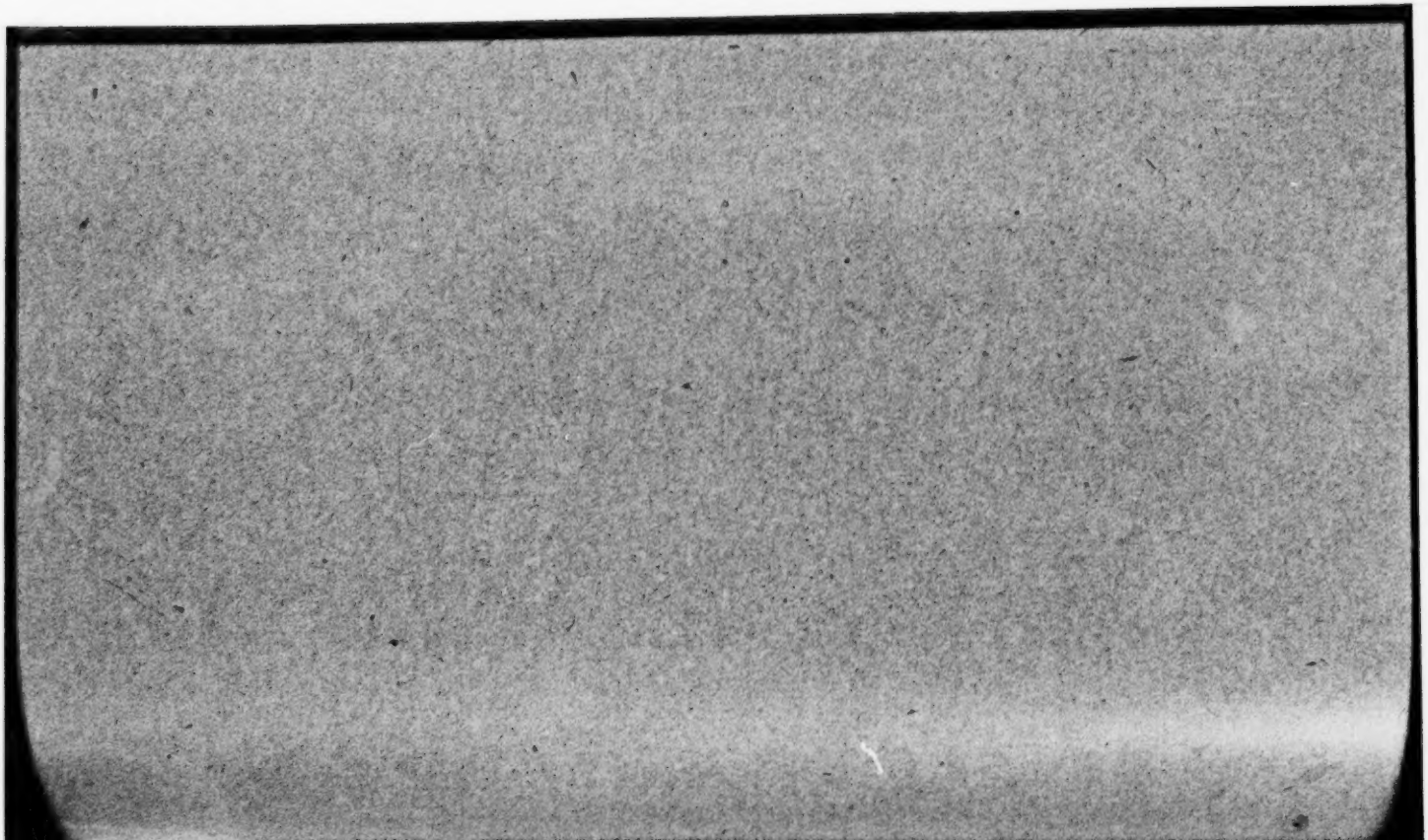

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THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Libellant.

BRIEF FOR PETITIONER.

On the 11th of November, 1891, The Erie & Western Transportation Company as owner of the steamer "Conemaugh" and as bailee of her cargo filed a libel in the District Court of the United States for the Eastern District of Michigan against the propeller "New York," to recover $70,000, as the damages sustained by reason of a collision in the cost of raising and repairing the steamer "Conemaugh," the loss of her use while being raised and repaired, and the damages sustained by her cargo.

The Union Steamboat Company as claimant and owner of the propeller "New York" filed its answer to this libel, denying all liability.

Subsequently it filed its cross libel against the propeller "Conemaugh" to recover the sum of $3,000, damages sustained by the "New York" in the same collision.

No answer was filed to this cross libel. At the trial the District Court held both vessels at fault for the collision.

See,

The "New York," 53 Fed. Rep., 553.

On a motion for a rehearing, the District Court reversed its decision and held the "New York" solely at fault for the collision.

Subsequently certain insurance companies that had insured the cargo of the "Conemaugh" filed an intervening petition in the cause, claiming the following amounts as part of the damages to the cargo for which the libelant had brought suit as bailee or trustee:

British & F. M. Ins. Co. Limited	$2,421 84
Ins. Co. of North America	7,950 09
Union Marine Ins. Co	8,553 06
Marine Ins. Co	916 57

To each of these petitions, the Union Steamboat Company filed its answer denying all liability for the collision, alleging that the fault rested solely upon the "Conemaugh."

On the 25th day of January, 1895, a stipulation was entered into by the parties, finding that the damages sustained by the "New York" in the collision amounted to the sum of $3,391.19. (Rec., 12.)

The Circuit Court of Appeals reversed this decision of the District Court and found the "Conemaugh" solely at fault for the collision, and decreed that the Union Steamboat Company was entitled to recover from the libelant the amount of the damages sustained by the "New York."

The "New York," 82 Fed. Rep., 819.

The petition for a rehearing was filed and denied.
The "New York," 86 Fed. Rep., 814.

The case was then brought by writ of *certiorari* to this court, and this court held that both vessels were at fault.
The "New York," 175 U. S., 187.

On March 17, 1900, the parties entered into a stipulation (Rec., 23), which provided that the damages sustained by the parties in the case should be as follows:

Erie & Western Transportation Company, owners of propeller "Conemaugh"	$30,508.46
Erie & Western Transportation Company, trustees for underwriters on cargo other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Ltd.	2,421.84
The Insurance Company of North America	7,950.09
The Union Marine Insurance Company	8,553.06
The Marine Insurance Company, Limited	916.57
The Union Steamboat Company, owners propeller "New York"	4,341.80
	$74,319.49

On the 24th day of March, 1900, the District Court in pursuance to the mandate entered a decree (Rec., 24), by which the Union Steamboat Company, owner of the propeller "New York," should pay all of the damages sustained by the intervenors, and by the libelant as bailee of the cargo, making all of the cargo damage, and also pay one-half of the damages sustained by the "Conemaugh" herself, less the amount of the damages to the "New York" so that the Union Steamboat Company would pay 76 and 5-10 per cent. of all the damages in the case instead of 50 per cent. of the same.

Thereupon the Union Steamboat Company filed its petition in this court, praying for a writ of mandamus directed

to the Judge of the District Court, to order him to set aside the decree, and to enter a decree which would hold the owners of the "New York" for but one-half of the amount of the damages, in the doing of which, after allowing the contribution, there would still be an affirmative decree in favor of the libelant, the owners of the "Conemaugh," for $12,976.38.

This court issued an order to show cause, and upon a hearing upon the petition and answer of the District Judge, argument and briefs of counsel, the court decided on May 28, 1900, that petitioner's remedy was by appeal and not by mandamus.

See,

Ex parte Union Steamboat Company, 178 U. S., 317.

Thereupon an appeal was prayed by the Union Steamboat Company to the Circuit Court of Appeals.

A motion to dismiss the appeal was denied.

The "New York," 104 Fed. Rep., 561.

The case was then heard and the decision of the District Court was affirmed.

The "New York," 108 Fed. Rep., 102.

Note—See opinion made a part of the petition for a writ of *certiorari.*

PETITIONER'S SPECIFICATIONS.

We contend for the following:

First. We contend on behalf of petitioner that under the law, practice and procedure in Courts of Admiralty it is well settled, that in all cases of collision, when two vessels are concerned, and both are found at fault, the damages

arising out of the collision be equally divided between the owners of the respective vessels, each paying one-half of the sum.

Second. We contend that whenever one of the vessels in fault is compelled to pay the whole of the damages of a third or innocent party, that any amount above a moiety of such damages which shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value) pay one-half of all damages arising out of the collision.

Third. We contend that under the law and practice in the Admiralty Courts of the United States, it is not necessary to bring a libelant in as a co-defendant under Admiralty Rule 59 in case an intervening petition is filed by a cargo owner who was originally a party libelant, and first came into court under the original libel by the vessel owner suing for himself and as bailee of the cargo.

Fourth. We contend that whenever all the parties are before the court either as libelants or claimants and the court finds libelant's and claimant's vessels both at fault, further pleadings on behalf of the claimant like cross petitions or libels are not necessary to enable the court to grant recoupment and divide all the damages equally, even where part of the damages are awarded to an intervening cargo owner.

Fifth. We contend that it is not necessary upon an appeal from the District to the Circuit Court of Appeals, that the record should show that recoupment had been demanded by pleadings or otherwise, as the trial in the Circuit Court in such a case is a trial *de novo*.

Sixth. We contend that if, on appeal from the District to the Circuit Court of Appeals, the respondent or claim-

ant prays for recoupment which will divide the damages equally between the libelants and claimants (both vessels being held at fault), the court shall grant such recoupment, notwithstanding the fact that the record does not show that recoupment had been prayed or demanded in the District Court.

Seventh. We contend that the courts erred in holding that the rate of interest in Michigan on judgments is 7 per cent.

Eighth. We contend that interest in admiralty has never been allowed at a higher rate than 6 per cent., and that that is a uniform rate existing in all the courts of the United States without reference to the legal rate prevailing in the different states in which the courts are located.

BRIEF AND ARGUMENT.

At the time of the hearing in the District Court, after the mandate of this court, we asked the court to enter the following decree, which appears as a part of the answer of the District Judge to the order to show cause in the case of *Ex parte Union Steamboat Company, supra.* We offer this to show that the question of recoupment *was* raised in the District Court. It is as follows:

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

The Erie & Western Transportation Company, owner of the Propeller "Conemaugh," *Libelant,* The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; the Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors,* *vs.* The Propeller "New York," The Union Steamboat Company, *Claimant.*	*In Admiralty.*

On reading and filing the mandate of the Supreme Court in this case, bearing date January 22, 1900, and in obedience to said mandate, and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said propeller "Conemaugh" and the said propeller "New York" were both at fault for the collision set forth in the pleadings in this cause, and that the

damages resulting therefrom to the said libelant, the owners of the cargo of the "Conemaugh" and underwriters thereon, the intervening petitioners, and the claimant of the propeller "New York" be equally divided between the said Erie & Western Transportation and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the damages resulting from the said collision, together with interest thereon to July 3, 1896, amount to the sum of $74,319.49 and are payable to the following named and in the following proportion, viz:

Union Steamboat Company, damage to "New York"	$ 4,341.80
Erie & Western Trans. Co., damage to "Conemaugh"	30,508.56
Erie & Western Trans. Co., trustee for owners of cargo and underwriters other than intervenors.	19,627.67
British & Foreign Marine Ins. Co., Lim., Intervenors	2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

And it appearing that the above named intervenors were insurers of portions of the cargo of the "Conemaugh" and that they have suffered damages on account of said collision, as follows, viz.:

British & Foreign Insurance Co.	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and the American Surety Company, its surety, their several damages aforesaid, amounting in all

to the sum of $19,841.56, with interest thereon at the rate of 5 per cent. per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have execution therefor.

And it further appearing that the Erie & Western Transportation Company, as trustee for the underwriters and owners of the cargo of the "Conemaugh," has suffered damage by the said collision in the sum of $19,627.67, and that the Erie & Western Transportation Company, as owner of said propeller "Conemaugh," has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company for itself, and as trustee, recover from the said Union Steamboat Company and its surety one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56 hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer "Conemaugh," amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer "New York," amounting to the sum of $12,976.38, with interest thereon at the rate of 5 per cent. per annum, from July 3, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court or to the proctors for said Erie & Western Transportation Company the said sum of $12,976.38, with interest as aforesaid, and that in default thereof that it have execution therefor.

It is further ordered, adjudged and decreed that the said

Erie & Western Transportation Company recover from the Union Steamboat Company and its surety the sum of $84.12, being one-half of the costs of the Supreme Court; $276.75, less one-half of the costs of the Circuit Court of Appeals, $192.63, and further that said Erie & Western Transportation Company do recover from the Union Steamboat Company and its surety one-half of the costs in this court to be taxed, and that in default in the payment of any of said sums that the said Erie & Western Transportation Company have executions therefor against the said Union Steamboat Company and the American Surety Company.

This decree the District Court refused to enter and in place of entered the decree found at page 24 of the record, which provided that the Union Steamboat Company pay all the damage of the cargo owners and one-half of the damages sustained by the "Conemaugh."

I.

WE CONTEND ON BEHALF OF PETITIONER THAT UNDER THE LAW, PRACTICE AND PROCEDURE IN COURTS OF ADMIRALTY IT IS WELL SETTLED THAT IN ALL CASES OF COLLISION, WHEN TWO VESSELS ARE CONCERNED, AND BOTH ARE FOUND AT FAULT, THE DAMAGES ARISING OUT OF THE COLLISION BE EQUALLY DIVIDED BETWEEN THE OWNERS OF THE RESPECTIVE VESSELS, EACH PAYING ONE-HALF OF THE SAME.

It is unnecessary to cite authorities in support of this proposition, because ever since the decision of the case of *The Schooner "Catharine"* v. *Dickinson,* 17 How., 170, it has been the settled law of the United States that when the court finds both vessels concerned in a collision at fault, all of the damages are equally divided between them.

See

The "North Star," 106 U. S., 17.
The "Chattahoochee," 173 U. S.
The "Manitoba," 122 U. S., 97.
The "Albert Dumois," 177 U. S., 240.

II.

WE CONTEND THAT WHENEVER ONE OF TWO VESSELS IN FAULT IS COMPELLED TO PAY THE WHOLE OF THE DAMAGES OF A THIRD OR INNOCENT PARTY, THAT ANY AMOUNT ABOVE A MOIETY OF SUCH DAMAGES WHICH SHALL BE PAID BY SUCH VESSEL CAN BE RECOUPED OR SET OFF AGAINST ANY CLAIM FOR DAMAGES THAT THE OTHER VESSEL MAY HAVE SUSTAINED BY REASON OF THE COLLISION, SO THAT EACH VESSEL (IF SHE BE OF SUFFICIENT VALUE) PAY ONE-HALF OF ALL DAMAGES ARISING OUT OF THE COLLISION.

The right to recoup or set off, as we contend for in this case, has long been the settled law in courts of admiralty in this country. One of the earliest cases found in the books is that of *The "Eleanora,"* 17 Blatch., 88.

In that case the owners of the schooner "Transit" and the owners of her cargo, each filed a libel against the steamship "Eleanora" on account of a collision which resulted in the loss of the schooner and cargo.

The court held that both the schooner and the steamer were at fault for the collision, and, on page 104, the court, Chief Justice Waite, says:

> "Both vessels being in fault, as between themselves, the damage must be apportioned. Castner and others, who sue the 'Eleanora' alone, for the cargo, are entitled, under the rule in the case of *The 'Atlas'* (93 U. S., 302), to a decree for the full amount of their loss; and, as the 'Transit,' if she had been joined, would have been liable for one-half of this loss, *a credit may*

be allowed the 'Eleanora,' on the decree in favor of the owners of the 'Transit,' for a sum equal to one-half of the damages of the cargo. Although separate libels were filed by the owners of the vessel and the owners of the cargo, they constitute, in effect, but a single suit. They have been heard together and submitted on the same evidence. Having all parties before it, the court may do what it would have done if there had been but one libel, that is to say, divide the damages of the collision throughout between the two colliding vessels. *A formal claim, to the effect, on the part of the 'Eleanora,' is not necessary.* It is rare that, in any case, a defending vessel makes a demand for a division of damages. A complete defense is generally insisted upon in the pleadings, and the apportionment is made by the court, on the facts as they are finally developed at the hearing. It is unnecessary to decide what the rule in this particular would be if the 'Eleanora' had not been subjected in the suit for the cargo, because here she has been, and that, too, upon the very testimony submitted in the suit between the two vessels. The fund belonging to the 'Transit,' growing out of the collision, is in court, and no injustice is done by using it to reimburse the 'Eleanora' for what she has paid for the 'Transit,' on account of the mutual fault of the two vessels."

Leonard v. *Whitwell,* 10 Ben., 638:

This was a libel *in personam* by the owners of the schooner "J. M. Leonard" against the owners of the steamship "Arragon" to recover the value of the schooner, her cargo and freight.

The court held both the schooner and the steamer at fault for the collision, and on page 658 Judge Choate says:

"The owners of the schooner have an undoubted right to sue on behalf of the owners of the cargo for its value. It would seem that, so suing, their rights as bailees must be as great as if the owners of cargo joined as libelants. No final decree should, therefore,

it seems, be made which will give the libelants a smaller amount as bailees than the owners of the cargo would be entitled to receive. * * * It seems to be unnecessary to make the owners of the cargo parties, if that could be now done. They are virtually before the court through the libelants."

The "C. H. Foster," 1 Fed. Rep., 733:

In this case the owners of the schooner "Helen Marr" filed their libel against the "C. H. Foster" for the loss of the vessel and her cargo, both of which were totally lost.

The court held both vessels at fault, and although the owners of the "Helen Marr" had limited their liability under Section 4283, the court found that the owners of the "Foster could recoup one-half the damages paid to the cargo against the sum which was due from the "Foster" to the "Marr," and this without additional pleading.

In *re Leonard,* following the ruling of Judge Choate in this case in 10 Ben., 638, the court holds that even though the limited liability proceedings had been taken on behalf of the schooner, the amount to be recovered from the offending steamer could be used as a fund to indemnify the steamer for what it had paid on account of the damage to the cargo exceeding one half.

In the case of *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279, citing with approval the language of Judge Choate in 10 Ben., 638, the court, on page 282, says:

"Upon the ascertainment of the damages to the respective parties it will be competent for the court, following in principle the case of *The 'Eleanora,'* 17 Blatch., 105, to direct that the amount recoverable by the libelants in the suit *in rem* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or their representatives, the insurers, who are the libel-

ants in the present suit, and be credited upon the claim in this suit. The claims of the respective parties would indicate a possibility that one-half of the loss of the cargo, for which the owners of the bark are answerable, may exceed the amount recoverable for the loss of the bark from the steamer. Should that prove to be the case, the libelants would be entitled to a judgment in this suit against the respondents, *in personam,* for the difference; and the latter, for their own indemnity, would be entitled to a decree against the libelants in the suit *in rem* for such excess."

The "C. H. Foster," 1 Fed. Rep., 733.

The "Canima," 17 Fed. Rep., 271:

This was a libel filed by the owner of the canal boat "Redfield," and also a separate libel by the owner of her cargo of coal against the steamboat "Canima." The court found both vessels at fault, and on page 272 says:

"Duncan, the owner of the cargo, is entitled to recover his whole damages, with costs, as in the case of *The 'Atlas,'* 93 U. S., 302. But as the steamship, in paying the owner of the cargo, sustains damages to that amount, she is entitled on payment to offset this against the loss recoverable by the owner of the canal boat, so far as that will go; or, what comes to the same thing, the steamboat may charge against the sum payable to the owner of the canal boat the one-half of the damages to the cargo, which the latter ought by reason of his negligence to pay for the cargo, as in the case of *The 'Eleanora,'* 17 Blatch., 88, 105; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *Leonard* v. *Whitwell,* 10 Ben., 638, 658; *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279."

The "Hercules," 20 Fed. Rep., 305:

In this case two libels were filed against the steamer "Hercules," one for the total loss of a schooner and one for the

loss of her cargo. The court held both vessels at fault, and on page 206 of the opinion, Judge LOWELL says:

> "The claimants now ask that, from the damages which would otherwise be due the owners of the schooner, they should be permitted to deduct or recoup one-half of the value of the cargo, because each party is liable for that loss, according to *The 'Atlas,'* 93 U. S., 302. A recoupment of this sort has been allowed in several cases. See *The 'Eleanora,' supra; Leonard* v. *Whitwell,* 10 Ben., 638; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *In re 'Leonard,'* 14 Fed. Rep., 53; *Atlantic Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279; *The 'Canima,'* 17 Fed. Rep., 271. That one vessel was wholly lost does not prevent a contribution in case of mutual default. *The 'North Star,'* 106 U. S., 17; S. C., 1 Sup. Ct. Rep., 41."

The "Job T. Wilson," 84 Fed. Rep., 149:

This was a libel by the owner of the tug "Wilson" against the steamship "Howard," and also an intervening petition by the owners of a scow in tow of the tug "Wilson" at the time of the collision.

The court held that the owners of the scow, as innocent parties, were entitled to recover from either the tug or the steamer, both having been held to be at fault for the collision, and on page 207 Judge MORRIS says:

> "It seems to me a similar injustice would be worked by permitting the owners of a vessel which is primarily liable for only one-half of the damage of an innocent sufferer to be compelled to pay the other half charged against the other vessel, and yet refusing to allow the owners of the vessel which has paid the whole to obtain the excess out of the money in their hands payable to the owners of the other vessel, for damages arising from the same collision. The whole object, as it seems to me, of the practice in admirality, which enables the court to deal with all the questions arising from a collision as

one transaction, is to prevent such inequitable results. *The 'City of New York,'* 25 Fed. Rep., 146; *The 'Canima,'* 17 Fed., 271; *The 'Hercules,'* 20 Fed., 205."

Jacobsen v. *Springer,* 87 Fed. Rep., 948:

This was a collision between the steamer "Argo" and the Norwegian steamship "Dumois." Petitions were also filed on behalf of people who were injured, and the Circuit Court of Appeals for the Fifth Circuit divided the damages, and on page 953 Judge PARDEE says:

"Finding, as we do, both the 'Dumois' and 'Argo' in fault, the decree of the District Court must be reversed, and a new decree, adjusting the damages, entered. The crew of the 'Argo' who lost their effects by the collision, are entitled to recover only half their damages from the 'Dumois,' and, as the 'Argo' was in fault, nothing from their own ship. *The 'Queen,'* 40 Fed. Rep., 694; *The 'City of Norwalk,'* 55 Fed., 102. Hester and Blesine, being passengers on board the 'Argo,' and not in fault, their representatives are entitled to recover the full damages from the 'Dumois,' but the 'Dumois' is entitled to recoup half the damages so paid. and deduct the same from the amount awarded to the owners of the 'Argo.' *The 'Hercules,'* 20 Fed., 205; *The 'North Star,'* 106 U. S., 17, 1 Supt. Ct., 41. The 'Argo,' being a total loss, can recover one-half her value from the 'Dumois,' less one-half the damages suffered by the 'Dumois,' shown by the record to be $185. Decreed accordingly."

This last case was affirmed by this court in *The "Albert Dumois,"* 177 U. S., 240.

"The Livingstone," 104 Fed. Rep., 918.

We are satisfied that the District Court was misled in the construction of the opinion of the Supreme Court by the quotation made by the latter from the case of the *"Juniata,"* 93 U. S., 337, in this language:

"Whatever their rights may be as against Pursglove by reason of such payment of more than half must be settled in another proceeding. It can not be done in this litigation."

In this case an original and separate libel was filed by the United States as owner of a certain scow against the steamer "Juniata" alone. The collision in the case was between the "Juniata" and the "Neafie," and a separate suit had been brought by Pursglove, owner of the "Neafie," against the "Juniata." Neither the "Neafie," nor Pursglove, her owner, had been made a party *to this suit,* therefore, when the court found the "Neafie" and the "Juniata" both at fault for the collision, it held that the United States, as the owner of the innocent scow in its suit against *the "Juniata" alone* must recover its full damage against the latter, and could not have a joint decree against *the "Juniata" and the "Neafie"* or Pursglove, as the owner of the latter, *because neither the "Neafie" nor Pursglove had been made a party to the libel filed by the United States against the "Juniata."*

The court, therefore, said that in this proceeding no one could be reached but the "Juniata," the only defendant in the case, and that, therefore, if Pursglove or the "Neafie" were to be reached, it must be in a separate proceeding.

The case of the "Juniata" would be in point if the owners of the cargo of the "Conemaugh" had filed an original and separate libel against *the "New York" alone;* then, unless the "Conemaugh" had been made a party to this libel, the decree must run for the whole amount against the "New York," and there would in that case be no opportunity to offset or recoup against the "Conemaugh" because the latter was not a party to the suit.

In this case, however, the intervenors came in under a proceeding in which the owners of the "Conemaugh" were libelants, and the owners of the "New York" claimants.

The other owners of the cargo of the "Conemaugh" have brought their suit in the name of the owners of the "Conemaugh." All parties in interest are, therefore, before the court either as parties libelant or respondent.

The owners of the "Conemaugh" as libelant, after the court has found that the libelant and claimants are jointly liable each for a moiety of the damages, would be estopped from saying that for the cargo damaged no recovery could be had against it, because it, the libelant, had not been made a party defendant by the owner of the cargo.

The "Livingstone," supra.

III.

WE CONTEND THAT UNDER THE LAW AND PRACTICE IN THE ADMIRALTY COURTS OF THE UNITED STATES, IT IS NOT NECESSARY TO BRING A LIBELANT IN AS A CO-DEFENDANT UNDER ADMIRALTY RULE 59 IN CASE AN INTERVENING PETITION IS FILED BY A CARGO OWNER, WHO WAS ORIGINALLY A PARTY LIBELANT AND FIRST CAME INTO COURT UNDER THE ORIGINAL LIBEL BY THE VESSEL OWNER SUEING FOR HIMSELF AND AS BAILEE OF THE CARGO.

The Circuit Court of Appeals held that when the intervening petition was filed by the underwriters of a part of the cargo of the "Conemaugh," that the "New York" might have availed itself of Admiralty Rule 59, and brought the "Conemaugh" in as a party respondent and as a vessel in fault, which also ought to be proceeded against for cargo loss, and cites in support of this proposition *The "Beaconsfield,"* 158 U. S., 303, 307.

When these petitions were filed, the "New York" took the only consistent position which it could take under the answer filed to the original libel, namely: that she was not at fault for the collision, and that the "Conemaugh" was the vessel that was guilty of all the fault.

It would have been an anomalous position to have said in one answer in the case that the "New York" was not at fault and the "Conemaugh" solely at fault; and in another answer to allege that both of the vessels were at fault, or that the "New York" might be at fault as well as the "Conemaugh" and that in such a case the damages should be divided.

Suppose such an answer had been filed. It would not have aided the court in the least in arriving at a division of the damages. It would have operated no more than a suggestion that in case both vessels were held at fault, that both should pay the damages sustained by the intervenors.

The case of *The "Beaconsfield"* is not in point, because in that case the only original libel was filed by the master and owner of the "Beaconsfield" for damages to the "Beaconsfield's" cargo *alone* against the "Brittania" *alone*, the latter claiming that the "Beaconsfield" was also at fault (she not being made a party libelant), brought her in under Admiralty Rule 59. This was necessary, because the "Beaconsfield" was not a party to the suit. Her owners and master were suing in the capacity of trustees and not as owners, and there could be no offset against them in that capacity, and it was absolutely necessary, if the "Beaconsfield" was to share a portion of the loss, or to bear all of it, that she should be brought in as a party defendant.

In this case, the owners of the "Conemaugh" were in court not alone as bailees or trustees, but as owners of the "Conemaugh," and therefore, were as much in court as a party libelant, as they could possibly be as a party defendant, and the court was perfectly competent to do in this case, what had been done in all of the cases cited in this brief, and in all cases that we have ever known of, viz.: to recoup and offset the damages, so that the innocent parties

would recover all of their damages, and the owners of the "Conemaugh" and "New York" would divide the loss equally between them.

The case of *The "Livingstone,"* 104 Fed. Rep., 918, is directly in point. In that case the libel was filed by the owners of the sunken steamer "Grand Traverse" against the "Livingstone" to recover the cargo damages as well as the damage to the libelant's vessel.

The court held that it was not necessary to bring the owners of the "Traverse" in under Rule 59, nor were pleadings in the form of the cross libels or petitions necessary. The stipulation in that case, like in the case at bar, estops the libelants from setting up any defense to the claim of the intervening cargo underwriters.

Recoupment has always been allowed without further pleadings and there was no more necessity for pleadings in this case than in any other.

There is not a case in the books nor in any text or form books, that states that such a proceeding or any proceeding in a case like this is necessary to enable the court to grant recoupment and adjustment of the payment of the damages so that they will be paid in equal amounts by the libelant and respondent.

IV.

WE CONTEND THAT WHENEVER ALL THE PARTIES ARE BEFORE THE COURT, EITHER AS LIBELANTS OR CLAIMANTS, AND THE COURT FINDS LIBELANTS' AND CLAIMANTS' VESSELS BOTH AT FAULT, FURTHER PLEADINGS ON BEHALF OF THE CLAIMANT, LIKE CROSS PETITIONS, OR LIBELS, ARE NOT NECESSARY TO ENABLE THE COURT TO GRANT RECOUPMENT, AND DIVIDE ALL THE DAMAGES EQUALLY, EVEN WHEN PART OF THE DAMAGES ARE AWARDED TO AN INTERVENING CARGO OWNER.

The District Court, in its return to the order to show cause (having written no opinion in the case), held that the pleadings were of such a character that decrees could not be entered which would permit the recoupment, and that under the form of the decree offered and urged by the Union Steamboat Company, the petitioner herein would obtain direct affirmative relief against the libelant for the sum of $6,621.88, and that such affirmative relief could not be had or obtained because of the absence of pleadings on behalf of the Union Steamboat Company praying such relief.

We contend that no further pleadings were necessary. In all of the cases of recoupment that we have been able to find in the books, there is not one of them that speaks of any additional pleadings.

The facts in the case of *The "Eleanora,"* 17 Blatch., 88, are similar to the facts in this case. There the owners of the "Eleanora" did not file any answer to the libel of the owners of the cargo of the "Transit," setting up the joint fault of the "Transit," or that she should contribute to any loss that the "Eleanora" might have to pay to the cargo owners. The court, however, had no difficulty in settling the damages, so that each party was held and paid one-half.

In the case of *The Atlantic Mutual Insurance Company*

v. *Alexandre,* 16 Fed. Rep., 279, the court say that if the amount paid to the cargo should exceed the amount to be recovered for one-half of the vessel, then:

> "Should that prove to be the case, the libelant would be entitled to a judgment in this suit against the respondents *in personam,* for the difference, and the latter for their own indemnity be entitled to a decree against the libelants in the suit *in rem* for such excess."

In none of these cases does it appear that any additional pleadings, except libels and answers, were filed.

The court, however, having all the parties before it and control of the fund, could so distribute it, and under such decrees as would result in the payment of all the damages, and a proper division of them among the parties liable.

When the decision of this court was reversed by the Supreme Court and both vessels were held at fault, then we contend no further pleadings were necessary, because the court decided both vessels at fault, which made an equal division of the damages. All the parties that were to bear these damages were before the court, either as libelant or claimant.

Let us suppose that further pleadings had been filed; they would have consisted of a sort of cross libel, or cross petition in which the "New York" would set up the payment of the cargo damages, and a prayer that these damages might be recouped against the claim of the "Conemaugh," either as libelant and owner, or as libelant, trustee or bailee. Such a petition could not be filed until after payment had been made. It would then be too late.

We could therefore see no useful purpose that such a petition or cross libel could serve.

If any injury could occur, or if a stranger to the controversy here was affected by such a decree as we contend for,

the case would be different. But no third part is in any way interested.

We therefore contend that no further pleadings are necessary in order to secure an equal division of the damages in this case.

The libelant by its contention is practically placed in the position of saying, that so much of the cargo as is represented by it as bailee or trustee can not recover against it, because it, the libelant, has not been made a party defendant by itself, the libelant trustee.

The libelant can not claim any benefit or advantage by reason of its dual position. It can not as libelant owner of the "Conemaugh" say to itself as libelant bailee that it will not pay one-half of the damages sustained by it as bailee of the cargo. It is as much liable as a party libelant in this suit as it would be as a party defendant. It is as much before the court in the one case as in the other, as much subject to the process and orders of the court, and we can see no advantage that could be gained by having the libelant also made a defendant in the same suit in which it is already a party libelant.

The objection made here is purely technical. All the questions in the case could have been settled in the District Court, as all the parties in interest were before the court.

Upon this question of further pleadings the case of *The "Eleanora,"* 17 Blatch., 83, cited at length herein, is directly in point.

See, also,

The "Livingstone," 104 Fed. Rep., 918.

Leonard v. *Whitwell,* 10 Ben., 638.

The "C. H. Foster," 1 Fed. Rep., 733, and the other cases cited in our brief.

The case of *The "Manitoba,"* 122 U. S., 97, in many particulars resembles the case at bar.

In that case the owners of the propeller "Comet" libeled the "Manitoba" for the following damages:

The value of the "Comet"	$30,000
The value of her cargo	35,000
The value of her freight	5,125

The court held both vessels at fault, divided the damages, and in doing so added together the total damages claimed by the libelant, and to these the damages sustained by the "Manitoba," and then entered a decree in favor of the libelant for one-half of these against the "Manitoba." The amount recovered, however, was less than the amount awarded, because of the limited liability proceedings which had been taken in the interests of the "Manitoba."

It does not appear in that case that any pleadings were filed by the owners of the "Manitoba" against the owners of the "Comet" to recover the damages sustained by the owners of the "Comet's" cargo. We doubt this ever having been done in any case. We certainly have had no such experience, nor have we been able to find any case of the kind in the books.

Libelant furnishes no precedent or authority to sustain the position that the court can not now, under the present state of the pleadings, grant the relief asked and do full and perfect justice to all the parties in interest.

In the case at bar, the decree we asked to have entered for the payment of all the damages of the intervenors, namely $19,841.56, by the Union Steamboat Company, and for a further recovery by the libelant from the Union Steamboat Company of the sum of $12,976.38, which, together, amounts to the sum of $32,817.94, one-half of the total damages sus-

tained in this case. This leaves the libelant to account to the owners of the cargo represented by it as trustee either for the whole or a part of the damages, if by any private arrangement or contract its liability was lessened.

Why should Courts of Admiralty, which up to this time have been Courts of Justice unhampered by the artificial pleadings, petitions, issues and other means often resorted to by courts of common law to thwart and defeat the ends of justice, be hampered by such things as the formal pleadings which are now advocated? For what purpose are they advocated? Not to promote justice and speedy relief, but to retard and obstruct it, and if possible defeat in this case the well settled rule of law that each party must bear one-half of the damages.

Here the owners of the cargo are not in court as independent and original libelants, but are represented by the owner of the "Conemaugh." The owner of the "Conemaugh," as libelant, after the court finds that the libelant and claimant are jointly liable each for a moiety of the damages, will be estopped from saying that this amount can not be recovered of it, because it, the libelant, was not made a party defendant by the owners of the cargo.

In other words, the libelant can not defeat the claim of *libelant as trustee* because as such trustee it did not make the libelant a party defendant. Neither can the libelant defeat the claim of the claimants for contribution because the latter did not make the libelant a party defendant.

The object of a pleading is to form an issue. In a case of this kind after the court had found both vessels at fault, all issues were determined and no new issues could be raised by any further pleadings that could be filed. The right of contribution existed of course, and could be enforced under the pleadings then on file in the case. More pleadings could

serve no useful purpose, as everything appears of record, and they would therefore be only an unnecessary incumbrance of the record.

Courts of admiralty have always favored the directest course, and simplest methods in arriving at the distribution and contribution of damages in collision cases.

A very able review of the authorities touching the point of additional pleadings is found in case of *Ebert* v. *The Schooner "Reuben Doud,"* 3 Fed. Rep., 520, and it seems to us that *The "Sapphire,"* 18 Wal., 51, as well as the case of *The "Pennsylvania,"* 12 Blatch., 67, Sc. 19 Wal., 125, were also in point.

In these cases, it has practically been held that a cross libel is not necessary if it appear from the answer that the respondent has suffered damages. Such damages can be recouped without a cross libel.

This is not necessarily in conflict with the authorities that hold that to obtain affirmative relief a cross libel is necessary.

In this case affirmative relief is not demanded, but the libelant is to recover a decree for a considerable amount in settling the damages arising out of the collision.

Courts of Admiralty in England have been equally liberal in this respect.

The "Seringapatim," 3 Wm. Rob., 38:

In this case the cross action had been abandoned and after the court had held both vessels at fault. Dr. Lushington, in his opinion, says:

> "Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to

> the amount of the compensation to which the owners of the 'Hariet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages, sustained by the owners of the 'Seringapatim."

With all the parties before the court, we claim that no further or other pleadings are necessary.

In the case of *The "Livingstone,"* 104 Fed. Rep., 918, the proctor for the appellee made the same point that he is making here, but the District Court for the Western District of New York held that the libelant must account to the owner or underwriter of his cargo in the same manner as if made a party defendant, although not such by cross libel, petition or answer. This is no hardship. If successful and he recover all he must account to the cargo owner.

V.

WE CONTEND THAT IT IS NOT NECESSARY, UPON AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THAT THE RECORD SHOULD SHOW THAT RECOUPMENT HAD BEEN DEMANDED BY PLEADINGS OR OTHERWISE, AS THE TRIAL IN THE CIRCUIT COURT, IN SUCH A CASE, IS A TRIAL *de novo*.

We claim we are entitled to a new trial and that a trial *de novo* gives the appellants the right to be heard upon any point that can be raised upon the record, and it is entirely immaterial whether this record shows that the same point had been raised in the District Court or not, and that even if it had not been raised in the District Court, the Court of Appeals should consider it though raised for the first time on appeal. This court has never passed upon this question since the passage of the Act of 1891.

As to Trial *de Novo*.

The Act of Congress of March 3, 1891, establishing the Circuit Court of Appeals, provides in Section 11 as follows:

> "And all provisions of law now in force regulating the methods and systems of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals."

This section left the mode of procedure in appeal cases in admiralty from the District Court in substantially the same condition and under the same practice as existed at the time of the passage of the act.

The Act of Congress passed February 16, 1875, and entitled: "An Act to facilitate the disposition of cases in the "Supreme Court and for other purposes," is expressly repealed by the 14th Section of the Act of 1891, as are also all acts or parts of acts inconsistent with the provisions for review by appeals in Section 5 and 6 of the act.

While, under the Act of 1875, it was the duty of the Circuit Court in case of appeals in admiralty to the Supreme Court, to make findings of fact, these provisions did not affect the procedure in appeals from the District Court to the Circuit Court, and it was held in the case of *The "Havillah,"* 48 Fed. Rep., 684, that in appeals from the Circuit Court to the Circuit Court of Appeals, even after the passage of the Act of 1891, findings of fact as provided by Act of 1875 were not necessary.

Section 30 of the Act of Congress, September 24, 1789, provides that on appeals in admiralty from the District to the Circuit Court, the same witnesses who were examined in the former might be re-examined in the latter. This

provision of the laws was omitted in revision of 1874, and we find in the Revised Statutes, Section 631, as follows:

> "From all final decrees of the District Court in causes of equity, of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of $50, exclusive of costs, an appeal shall be allowed to the Circuit Court, next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632: "In case of an appeal as provided by the "preceding section, copies of the proof and such entries "and papers on file *as may be necessary* on hearing of the "appeal may be certified up to the Appellate Court."

Section 862, passed August 23, 1842, provides: "The "mode of proof in causes of equity and admiralty and mari- "time jurisdiction shall be according to rules now or here- "after prescribed by the Supreme Court, except as herein "specially provided."

Under this act the Supreme Court formulated Admiralty Rules 49 and 50. The first of these rules provided for the taking of depositions in the Circuit Court, and Rule 50 requires that the oral evidence shall be taken down by the Clerk of the District Court, pursuant to the Act of Congress, 1789, and this shall be transmitted to the Circuit Court and used in evidence on appeal, and it then proceeds as follows: "Saving to each party the right to take the "deposition of the same witnesses, or either of them, if he "should elect." Rule 52 specifies how the records in appeals in admiralty to the Circuit Court shall be made up, and this rule is expressly recognized by Rule 6 of the Courts of Appeals.

It will be noticed that the last, the 11th section, of this rule, is as follows: "The prayer for an appeal and the ac-

"tion of the District Court thereon, *and no reasons of ap-*
"*peal shall be filed or inserted in the transcript,*" *and then follows what shall be omitted.*

This is substantially all the statutory law and the rules made in pursuance of the statutes that bear upon this subject. We will now proceed to take up the decisions of the various Circuit Courts and of this court, upon the question of whether on an appeal from the District to the Circuit Court there was a trial *de novo,* and whether under the Act of 1875, and the Act of 1891, the trial in a case on appeal from the District to the Circuit Court of Appeals shall be a trial of *de novo.*

In the case of *Yeaton* v. *U. S.,* 5 Cranch, 283, Chief Justice Marshall says:

> The majority of the court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the Appellate Court be pronounced. The cause in the Appellate Court is to be heard *de novo,* as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the District to the Circuit Courts of the United States, but in this court also."

The Steamer "Saratoga" v. 438 *Bales of Cotton,* 1 Woods, 75. This was a case in which the libelant recovered the sum of $900, and then took an appeal from the District to the Circuit Court. The Circuit Court dismissed the libel, whereupon the libelant contended that inasmuch as the claimant had not appealed from the decree of the District Court, the decree for $900 in favor of the libelant must stand.

Judge Woods says the following:

"When libelants appealed, the appeal opened the

whole case. They can not be allowed to claim the benefit of the decree below, and, standing secure on that, try their fortunes in this court. In admiralty cases an appeal suspends the decree altogether. It is not *res adjudicata* until the final sentence of the Appellate Court is pronounced. *The 'Roarer,'* 1 Bl., C. C. I., *Yeaton* v. *The United States,* 5 Cranch., 281. The cause in the Appellate Court is to be heard *de novo,* as if no decree had been passed. We do not find these views opposed to the authorities cited by libelants. In fact, those authorities do not seem to touch the question at all."

In the same court by Pardee, J., *"Lillie,"* 42 Fed. Rep., 179; *The "Cassius,"* 41 Fed. Rep., 367.

The case of *The "Lucille,"* 19th Wall., 73:

In this case Mr. Justice Miller, on p. 74, says:

"An appeal in the admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated, a new trial, in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be enforced by the order of that court and the record remains there."

In the case of *The "Charles Morgan,"* 115 U. S., 69, Mr. Chief Justice Waite, after approving the language used by the Supreme Court in the case of *The "Lucille,"* states that the parties had a right in the Circuit Court to amend their pleadings and cites a number of cases upon this point.

The case, however, which is directly in point, is that of *Irvine* v. *The "Hesper,"* 122 U. S., 256. In that case the District Court awarded the libelant a certain sum for salvage, and an appeal was taken by the libelants, but the claimants failed to perfect their appeal. The Circuit Court

awarded a sum less than that awarded by the District Court. Thereupon the libelants appealed to the Supreme Court, which affirmed the decree of the Circuit Court. On p. 266 Justice Blatchford says:

> "The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court."
>
> *Yeaton* v. *U. S.*, 5 Cranch, 281.
>
> Anonymous, 1 Callison, 22.
>
> *The "Roarer,"* 1 Blatchford, 1.
>
> *The "Saratoga"* v. 438 *Bales of Cotton,* 1 Woods, 75.
>
> *The "Lucille,"* 19 Wall., 72.
>
> *The "Chas. Morgan,"* 115 U. S., 69, 75.

> "We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."
>
> *The "Hesper,"* 18 Fed. Rep., 696.

The "Philadelphian," in the Circuit Court of Appeals for the First Circuit, 60 Fed. Rep., 423:

In this case the court held that the provisions of the Judiciary Act of 1875 did not apply to the Circuit Court of Appeals in cases of appeals from the District Court, approving the decisions of the court in *The "Havillah,"* 48th Fed.

Rep., and the court repeats the language used by the Supreme Court in the case of *"Lucille,"* viz.: "That there is a "new trial, completely and entirely new, with other testi- "mony and other pleadings, if necessary, or if asked for."

The "Louisville," 154 U. S., 657. In this case Mr. Chief Justice Waite delivered the following:

> "An appeal in admiralty from the District Court to the Circuit Court vacates the decree appealed from. The case is heard *de novo* in the Circuit Court, without any regard to what was done below. An entire new decree is entered, which the Circuit Court carries into execution. The cause is not remanded to the District Court. After the suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally begun in that court."
>
> *The "Lucille,"* 19 Wall., 74.
>
> *Montgomery* v. *Anderson,* 21 How., 388.
>
> *Yeaton* v. *United States,* 5 Cranch, 283.
>
> *Nelson* v. *White,* 83 Fed. Rep., 215, decided by the Circuit Court of Appeals for the 9th Circuit.

In this case it is held by the court and stated as follows:

> "It is a well settled rule that an appeal in admiralty is to all intents and purposes a trial *de novo.*"

The court further holds that the judiciary act of 1875 does not apply to the admiralty appeals from the District Court to the Circuit Court of Appeals.

> *Singlehurst* v. *La Campagnie Gen. Trans.,* 50 Fed. Rep., 104.
>
> *Pettie* v. *Boston Tow Boat Co.,* 49 Fed. Rep., 464.
>
> State of California, *Ibid.,* 172.

In the late case of *Gilchrist* v. *The Chicago Insurance Company,* 104 Fed. Rep., 566, Mr. Justice Harlan holds that

in appeals in admiralty from the District to the Circuit Court of Appeals, there is a trial *de novo*.

In this case the libelant appealed from the decree in his favor in the District Court. The respondent did not appeal.

It was contended on behalf of the libelants that the respondents could not be heard except in defense of the decree, whereas respondents contended that the appeal gave them a trial *de novo* in the Circuit Court of Appeals and that they could be heard upon all the defenses which were interposed in the District Court.

On page 571 the court say:

> "We do not think that the rule has been changed by the above act of March 3, 1891, under which an appeal from the District Court goes to the Circuit Court of Appeals, and not to the Circuit Court. The clause in that act (section 11) that 'all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals, does not prevent a Circuit Court of Appeals, when hearing an appeal in admiralty, from exercising all the power that a Circuit Court could have exercised in a like case prior to the act of 1891. On the contrary, that clause implies that an admiralty appeal by the libelant in the Circuit Court of Appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the Circuit Courts prior to the passage of that act. It results that this court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libelants are not entitled to a decree in any amount,—and such is the contention of the underwriters,—we

may dismiss the libel, notwithstanding the underwriters did not themselves directly appeal from the decree."

In the recent case of the *Graham & Morton Transportation Co.* v. *The Chicago Insurance Co.*, 108 Fed. Rep., 271, the United States Circuit Court of Appeals for the Seventh Circuit in part reiterated what was said in the last case, and practically held that assignments of error were not necessary in case of an appeal in admiralty.

VI.

WE CONTEND THAT IF, IN CASE OF AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THE RESPONDENT OR CLAIMANT PRAYS FOR RECOUPMENT WHICH WILL DIVIDE THE DAMAGES EQUALLY BETWEEN THE LIBELANTS' AND CLAIMANTS' VESSELS, BOTH BEING HELD AT FAULT, THE COURT SHALL GRANT SUCH RECOUPMENT, NOTWITHSTANDING THE FACT THAT THE RECORD DOES NOT SHOW THAT RECOUPMENT HAD BEEN PRAYED OR DEMANDED IN THE DISTRICT COURT.

If there is a trial *de novo* as we have shown by the authorities cited, under the preceding point, then appellant had a right to ask the appellate court to grant recoupment and remand the case for the entry of such a decree as would properly divide the whole damage arising out of the collision equally between the libelant and claimant.

An assignment of error is filed in this case which brings up the question of recoupment.

It may be doubted, however, if an assignment of error even is necessary. We believe that no reason for an appeal is necessary under the present law and rules of the Court of Appeals.

Prior to the Act of 1891, appeals in admiralty went from the District to the Circuit Court, under Section 631 of the Revised Statute, which provides as follows:

> "From all final decrees in the District Court in cases of equity or *of admiralty and maritime jurisdiction,* except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, *an appeal* shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632 provides as to the record on appeal:

> "In case of an appeal as provided by the preceding section, copies of the proofs, and of such entries and papers on file *as may be necessary* on hearing of the appeal, may be *certified* up to the appellate court."

In the case of the *United States* v. *Monson,* Case No. 16750 Fed. Cas., Mr. Justice Story, in reviewing the right to appeal from a District to a Circuit Court, under the Acts of 1789 and 1803 said that *no appeal* lies from the District to the Circuit Court, except in cases of admiralty and maritime jurisdiction, and that a writ of error is the proper process to correct the errors of the District Court in common law actions.

In a very able and exhaustive opinion on the difference between an appeal and a writ of error, among other things the learned Justice said:

> "The remedy by appeal, as known and practiced in England, is in a great measure confined (for I speak not of summary proceedings before magistrates, or appeals of death or robbery) to causes of equity, ecclesiastical and admiralty jurisdiction; in all of which no jury intervenes. In the courts possessing these respective jurisdictions, the Judge is in general the sole arbiter of the fact and of law, and the mode of proceeding is borrowed, almost exclusively, from the civil law. It is undoubtedly true that in courts proceeding according to the course of the civil law, an appeal from an inferior to a superior tribunal removes the whole pro-

ceedings, and usually, though not invariably, opens the facts as well as the law to re-examination. (*Wiscart* v. *D'Auchy*, 3 Dall (3 U. S.), 321.)"

U. S. v. *Nourse*, 6 Pet., 470.

U. S. v. *Haynes*, 2 McLain, 155

Section 6 of Rule 14 of the Court of Appeals for the Sixth Circuit provides:

> "The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court."

Under the Act of 1842 the Supreme Court promulgated General Admiralty Rule 52. Section 11 of this rule provides:

> "The prayer for an appeal and the action of the District Court thereon *and no reasons for the appeal shall be filed or inserted in the transcript.*"

It also provides that the certificate of the Clerk is all that is needful to complete the record.

Assignments of error are only proper in cases of review by writs of error as at common law, and the service of citations also applies only to cases of writs of error. A writ of error is a new suit instituted to review the decision of the inferior court.

Under the practice that prevailed prior to the organization of the Circuit Court of Appeals, in appeals from the District to the Circuit Court, it was not the practice to issue a citation, or to serve the same, because the case was up by appeal and not by writ of error. So held in *The "Ellen,"* 4 Blatch., 107.

Let us trace the origin of the rules of the appellate courts on this subject.

Rule 14 of the Court of Appeals was copied from Rule 8 of the Supreme Court. Let us compare:

The first sections are identical, except that there is added to the rule in the Court of Appeals that the Clerk may require a præcipe of the appellant or plaintiff in error.

Sections 2, 3 and 4 are identical. Section 5 as to citations is changed but slightly, and the change amounts to this, that they shall be in all cases made returnable in thirty days from the date thereof, instead of the first day of the term.

Section 6 is changed because under the Act of 1875 in appeals from the Circuit to the Supreme Court, the Supreme Court merely passed upon the findings of fact by the Circuit Court, and the questions of law arising upon these.

We quote at length Section 5 of Rule 8 of the Supreme Court to show that that rule provided merely for a citation in case of a writ of error, *and not in cases of appeal.*

> "In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, *the writ of error and citation,* if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day."

We also insert here Section 5 of Rule 14 of the Circuit Court of Appeals:

> "All *appeals,* writs of error and citations must be made returnable not exceeding thirty days from the date on which the *appeal* is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident, the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be

discharged unless another resident be designated of record in the case upon whom service may be had."

It will be noticed that the section begins with the words "All appeals, writs of error, and citations must be made "returnable not exceeding thirty days."

It is apparent, when reading both the rule from which Section 5 was copied and Section 5 itself, that the citation was not intended to apply to appeals at all, and that whoever framed these rules lost sight of the difference between writs of error and appeals, and that the rule should be read with the word "appeals" in the first line stricken out.

There certainly is no sense in saying that an appeal must be made returnable from a certain date. The appeal goes as a matter of right, and no citation should be necessary. Ordinarily an appeal runs to the next term of the appellate court.

We have always contended that the citation was unnecessary, but have used it merely to be on the safe side of the practice.

In Benedict's Admiralty we find the following:

"SECTION 628. In my opinion, the practice of making an assignment of errors is inappropriate to the admiralty. It is appropriate to the common law system, in which the theory is that questions of fact are to be determined by a jury, and are not to be reviewed by the appellate court, whose function is only to review the errors made by the Judge below, who has only matters of law to determine."

"SECTION 629.—ALLOWANCE OF APPEAL: The words of the 11th General Rule that 'no appeal shall be allowed until such assignment of errors is filed,' would seem to require an allowance of an appeal. Such an allowance in terms has not thus far been held to be indispensable, and the right to an appeal would seem to be a statutory right and therefore not subject to an

allowance or disallowance. The approval of the bond and the signing of the citation would probably be held to be an allowance of the appeal. But it is well to have the judge who approves the bond also in terms allow the appeal, in order to avoid question."

We can find no warrant, however, for the author's statement that a citation was required on an appeal in admiralty from the Circuit Court to the Supreme Court prior to the Act of 1891.

The rule of court certainly does not require it. Neither does the statute. We can find no reference to a citation, except in Section 5 of Rule 8, and this applies, as we have shown before, to final judgments and *not decrees,* and has reference only to writs of error, the words "writ of error and citation" always being found together.

So that, notwithstanding the 8th rule of the Court of Appeals providing that the practice, so far as may be, shall be the same as in the Supreme Court of the United States, no practice not required by law or the rules of that court can be held to be such practice as was intended to be adopted by this rule.

Citations may have been used, and in this way a practice to use them may have grown up and the court may have known of this, but there is nothing in either the statute or the rules of the court requiring it, and therefore it is not a rule of the Court of Appeals.

Under the former practice in taking appeals in admiralty cases from the Circuit Court to the Supreme Court it was done under Section 692, and the record in such cases was made up under Section 698, and this record did not require assignments of error or citations.

There are numerous decisions by the Supreme Court in the books in which the question of the necessity for issuing

and serving a citation in an appeal from the Circuit to the Supreme Court has come up.

Barril v. *Prop. "Mohawk,"* 3 Wall., 424.
Dayton v. *Lash,* 4 Orto., 112.
Str. "Douro," 3 Wall., 564.
C. & P. R. R. Co. v. *Blair,* 100 U. S., 661.
Vansant v. *Gas L. Co.,* 99 U. S., 213.
Farrar v. *Churchill,* 135 U. S., 609.

In some of these cases it is difficult to determine from the report of the case whether the case was one of common law or equity.

There seems to be running through these cases an indifference to the distinction between a writ of error and an appeal, and frequently the parties before the Supreme Court have been called appellants and appellees without reference to the fact that they were in that court as plaintiffs and defendants in error, and not as appellants and appellees.

In one case, that of *Farrar* v. *Churchill,* 135 U. S., 609, 10 Sup. Ct. Rep., 772, the court holds that in case of an appeal (which indicates that it is an equity case) assignments of error were necessary under Section 997.

This was a case in which a bill was filed in equity and subsequently a cross-bill, and by appeal the case was removed to the Supreme Court.

In addition to this the court quotes liberally from Supreme Court Rule 21, but seems to have lost sight of the difference between an appeal and a writ of error, and holds that there should have been an assignment of errors in the case, as required by Section 997. Section 997 is as follows:

> "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of

> the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

It will be noticed that this refers to writs of error exclusively and does not refer to appeals in chancery or admiralty cases.

Writs of errors are allowed under Section 691, which is as follows:

> "All final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from courts of the several states, and all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court on a writ of error."

A careful reading of Rule 21 preserves the distinction between an appeal and a writ of error, and in cases of writ of error refers to an assignment of errors, while in cases of appeal it refers to the specifications of error.

It has been held by this court that where the appeal is not prayed in open court a citation is necessary. We have seen that there is no rule or statute which requires a citation, and the purpose and object of the citation, as required by the various decisions of the court, is more in the nature of a notice to the opposite party that an appeal has been taken than process which would bring the case properly before the court.

In cases of appeal no process need be issued because the proceeding is a removal of the pending cause to a higher court, whereas the writ of error is the bringing of a new suit for the purposes of reviewing the actions of an inferior court.

After a careful examination of the statutes and the rules of the Supreme Court, we have been unable to find anything that would warrant the court in finding either that assignment of errors or a citation were necessary in cases of appeals in admiralty. It is perfectly clear that appeals were confined to cases of equity and admiralty and maritime jurisdiction, and that under separate and different acts of Congress cases of common law were removed from the Circuit to the Supreme Court by writs of error, and not by appeal.

We therefore contend that under the statute and rules of the Supreme Court there is no word that provides for assignments of error or citations in admiralty appeals, and that it is therefore improper and contrary to law to require them.

The rules of the Courts of Appeal were adopted at the suggestion of the Supreme Court, and as substantially alike.

In the Second Circuit, on July 1, 1892, 50 Fed. Rep., VII, the court adopted special rules in admiralty, and an examination of these shows that no assignment or errors or citation are required.

It seems to us that it is entirely clear that no reasons for an appeal need be stated in the record, on appeal to the Circuit Court of Appeals in any admiralty case. If these reasons are not necessary, then it can not matter whether the points in controversy were made first in the District Court or in the Circuit Court of Appeals for the first time, or not.

The trial is a new one, can be had upon the amended pleadings, additional testimony and other evidence, and the case presented may therefore be entirely different from the one presented in the District Court, and yet the court has the power, and it is its duty under the law, to hear and determine the case as presented before it, and by its mandate direct the proper decree to be entered in the District Court.

VII.

WE CONTEND THAT THE COURT ERRED IN HOLDING THAT THE RATE OF INTEREST ON JUDGMENTS IN MICHIGAN IS SEVEN PER CENT. PER ANNUM.

The mandate of the Supreme Court directs the District Court "to enter a decree in conformity with the opinion of this court, with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan."

Section 3 of Chapter 6 of the Revised Statutes of Michigan of 1838, is as follows:

> "The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time. Provided, that in cases of money loaned it shall be lawful for the parties to stipulate in writing for the payment of any interest not exceeding ten per cent. per annum."

Section 8 of the same chapter provides for interest on judgments, verdicts, etc., as follows:

> "Interest may be allowed and received upon all judgments at law for the recovery of any sums of money, and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made, and such interest may be collected on execution."

Section 8 was amended in 1855 (Session Laws 1855, page 31) by adding the following:

> "At the rate of seven per cent. per annum; Provided, That on a judgment rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum."

This section as amended is found in the compiled laws of 1857, Sec. 1317; Compiled Laws of 1871, Sec. 1635; Howell's Statutes, Sec. 1597, and Compiled Laws of 1897, Sec. 4865.

The legal rate of interest remained unchanged until 1887, when Sec. 3, above referred to, was amended, making the legal rate six per cent. per annum. Session Laws, 1887, page 153.

In 1891 the legislature passed an act entitled "An Act "to regulate the interest of money on account, interest on "money judgments, verdicts, etc.," as follows:

> "Section 1. The People of the State of Michigan Enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due."
>
> "Section 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."
>
> Compiled Laws of 1897, Sec. 4856.
>
> Session Laws of 1891, pp. 197-8.

The Legislature of 1898-9 amended Sec. 1 of the Act of 1891 by fixing the legal rate of interest at five per cent., and permitting parties to contract for a rate not exceeding seven per cent.

Public Acts of 1899, Act 207, page 324.

This act went into effect September 22, 1899, and the language is as follows:

"The People of the State of Michigan Enact:

"SECTION 1. That Section One of Act numbered one hundred and fifty-six of the Public Acts of eighteen hundred and ninety-one, entitled, 'An Act to regulate the interest of money on account, interest on money judgments, verdicts, etc.,' the same being compiler's section one thousand five hundred ninety-four of volume three of Howell's Annotated Statutes, and section four thousand eight hundred ninety-seven, be and the same is hereby amended to read as follows:

"SECTION 1. The People of the State of Michigan Enact: That the interest of money shall be at the rate of five dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding seven per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due."

It will be observed that in the first Act authorizing interest on judgments, verdicts, etc., the rate of interest which they should bear was not stated; in 1855 the Legislature fixed the rate at seven per cent., the then legal rate of interest.

It evidently never was intended that judgments, verdicts, or decrees should bear a higher rate of interest than the legal rate fixed by statute, except in cases where the instrument upon which suit is brought bears a higher rate for which parties might legally contract.

There can be no question but that the Act of 1891 contemplated the reduction of the rate of interest, not only on money due on account or contract, but upon judgments, verdicts, etc., as well.

The title of the act, viz.: "An act to regulate the interest

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"of money on account, *interest on money judgments, ver-*
"*dicts, etc.,*" fully expressed its object, and the body of the act providing that the interest of *money* should be at the rate of six per cent. per annum harmonizes with the title.

In *Ryerson* v. *Utley,* it is said: "Any provision of the "act directly or indirectly relating to the subject expressed "in the title, and having a natural connection therewith, "and not foreign thereto, should be embraced by it."

Ryerson v. *Utley,* 16 Mich., 278.

Under the constitution of Michigan the title of an act is significant, and usually controlling in determining its scope.

McKellar v. *Detroit,* 57 Mich., 158.

The body of the act must reasonably harmonize with the title.

Booth v. *Eddy,* 38 Mich., 245.
Bates v. *Nelson,* 49 Mich., 459, 462.
Northwestern Mfg. Co. v. *Judge,* 58 Mich., 381-3.
McKellar v. *Detroit,* 57 Mich., 158.

The construction of the statute contended for by the respondents, viz., that the Acts of 1891 and 1899 relate only to interest on contracts, and not to interest on judgments and decrees, is too narrow and technical to be seriously considered.

A statute should be construed reasonably and not in so narrow and technical a sense as unnecessarily to embarrass legislation.

Ryerson v. *Utley, supra.*

The title and the body of the act must be taken together, and the word *money* used in the body of the act must mean money due on judgments, verdicts, etc., as well as money on account.

Even without the clause contained in the Act of 1891, repealing all acts and parts of acts contravening the provisions of that act, that part of Section 4865, Compiled Laws, 1897, allowing seven per cent. interest on judgments, verdicts, etc., would be repealed by implication.

It is also contended by the appellees that Sec. 4865 is still in force because it is found in all the compilations from 1857 down to 1897, and counsel argues that two commissioners appointed to examine the general laws of the state have certified that the compilation of 1897 is a correct compilation of the laws, *in force* in the state, including the general laws and amendments passed at the session of 1897.

This argument is not sound. It is for the courts, and not for commissioners or compilers, to construe the laws of the state.

If Section 4865 is still in force, and judgments and decrees draw interest at seven per cent. per annum, the situation is a curious one, to say the least. Assume, for instance, that a note or contract specifies the now legal rate of interest (five per cent.); if such note or contract is put in judgment, the judgment will continue to draw five per cent., only, because of the clause in Section 4865 that if the judgment is rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum. If, however, the rate of interest is not specified in the instrument, the rate would be the legal rate, or five per cent., up to the time the judgment is obtained, and thereafter the judgment would draw interest at the rate of seven per cent.

We submit that Section 4865, fixing the rate of interest at seven per cent. on judgments and verdicts was repealed by the Act of 1891, and that under the amendment of 1889 appellees are entitled to but five per cent. interest on the amounts stipulated to be due them.

VIII.

WE CONTEND THAT INTEREST IN ADMIRALTY HAS NEVER BEEN ALLOWED AT A HIGHER RATE THAN SIX PER CENT. AND THAT THIS IS A UNIFORM RATE EXISTING IN ALL THE COURTS OF THE UNITED STATES SITTING IN ADMIRALTY WITHOUT REFERENCE TO THE LEGAL RATE PREVAILING IN DIFFERENT PLACES IN WHICH THE COURTS ARE LOCATED.

The allowance of interest in cases of admiralty rests entirely in the discretion of the court.

Hemmenway v. *Fisher,* 20 How., 255.
Dyar v. *National Steam Nav. Co.,* 118 U. S., 507.
The "North Star," 44 Fed. Rep., 497.

In the case of *The "Mary Eveline,"* 14 Blatch., 497, Fed. Case 9212, Mr. Justice Hunt says:

> "In allowing interest at the rate of seven per cent. for the damage sustained, as upon a total loss, I think the Commissioner erred. The rate in such cases is established in Admiralty at six per cent., and the exception under consideration is allowed unless the libelants shall, within ten days after the entry of the order in pursuance of this opinion, file their stipulations, deducting one-seventh of said interest, to wit, the sum of $212.05, from the decree to be entered in this case. If such stipulation be filed as above provided, the said tenth exception is overruled. This point is decided after a conference with Judge Blatchford, and with his concurrence and approval."

The "Mary J. Vaughan," Fed. Case 9217, 17 2nd, Ben., 47.
The "Aleppo," 7 Ben., 120.
Allen v. *McKay,* 1 Sprague, 219.

In the case of *The "Aleppo,"* Fed. Case 158, 347, Mr. Justice Blatchford said:

> "In admiralty, in cases of collision, where interest is allowed, it ought to be a uniform rate, and not one varying with the laws of the states. *Hemmenway* v. *Fisher,* 20 How., 255, 259. Such rate of interest in collision cases tried in this court has been and is six per cent., except that on money paid out here, for repairs made here, interest according to the law of this state has, in some cases, been allowed. This rate of six per cent. was fixed at an early day, in analogy, perhaps, to the rate fixed by act of Congress as the rate on bonds for duties to the United States. Act March 2, 1799, p. 65, 1 Stat., 677. It is the rate which the Supreme Court has allowed in cases of this kind."

From personal experience and observation it is the universal rule in the districts bordering on the Great Lakes that the rate of interest is six per cent., and nowhere is this better established than in the Eastern District of Michigan. In fact, the original decree in this case in the District Court was drawing six per cent. interest.

We think that in ordering the mandate the court lost sight of the fact that this was an admiralty case and therefore following the language used in cases at common law and chancery under the rule, inserted the words now found in the mandate and usually used in such cases.

The matter of interest being a matter of discretion the court should change the mandate.

Respectfully submitted.

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CHICAGO, September, 1902.